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No. 88-242

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

MARJORIE LINDER COOLEY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission is empowered by Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), to grant licenses to voluntary applicants for hydroelectric plants built prior to 1935 even though it may not require that such plants obtain licenses under Section 23(b) of that Act, 16 U.S.C. 817.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 843 F.2d 1464. The order of the Federal Energy Regulatory Commission (Pet. App. 65a-80a) is reported at 35 F.E.R.C. ¶ 61,303. The Commission's order denying rehearing (Pet. App. 20a-64a) is reported at 39 F.E.R.C. ¶ 61,117.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988. On July 7, 1988, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 9, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), provides in pertinent part:

> The Commission is authorized and empowered—
>
> To issue licenses * * * for the purpose of constructing, operating, and maintaining dams * * * or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States.

Section 23(b) of the Federal Power Act, 16 U.S.C. 817, provides:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam * * * or other works incidental thereto across, along, or in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person * * * intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of

such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person * * * shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

STATEMENT

This case involves a challenge to orders issued by the Federal Energy Regulatory Commission ("the Commission") in which the Commission granted a license for a small hydroelectric plant to Clifton Power Corporation (Clifton). Petitioner contends that the Commission had no statutory authority to grant Clifton a license.

1. In May 1981, Clifton applied to the Commission for a license to operate a small hydroelectric plant on the Pacolet River, a nonnavigable stream in Spartanburg County, South Carolina (Pet. App. 2a).[1] At the time of the application, the plant was idle. However, the Commission's predecessor, the Federal Power Commission, had issued a license to an earlier owner.[2]

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[1] The application was for a "short form license (minor)." A "minor water power project" is any water power project that would have a total installed generation capacity of 2000 horsepower (1.5 megawatts) or less. See 18 C.F.R. 4.30 (b) (17).

[2] Pet. App. 66a. See *Dan River Mills, Inc.*, 44 F.P.C. 1267 (1970). The license was subsequently rescinded at Dan

In July 1981, before any license was issued, Clifton began operating the project and selling the power it generated to Duke Power Company. In February 1982, petitioner Marjorie Linder Cooley, who owns approximately 97.68 acres of land upstream from the project, moved to intervene in the license proceeding, alleging that Clifton's operations were unlawful and had resulted in the flooding of a small portion of her property (Pet. App. 2a-3a & n.1). She opposed issuance of any license to Clifton.[3]

After learning that Clifton had begun to operate the project and to sell power from it, the Commission staff began an investigation into whether Clifton was violating Section 23(b) of the Federal Power Act (the "FPA" or "Act"), 16 U.S.C. 817 (Pet. App. 67a). This section prohibits operation of a project constructed after 1935 on a stream affecting interstate commerce without a license issued by the Commission. In response to an order to show cause, Clifton claimed that the plant had been constructed before 1935. Pet. App. 3a. Thereafter, the Commission terminated the show cause proceeding, citing the pos-

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River's request when it reported that the project was no longer feasible. *Dan River, Inc.*, 51 F.P.C. 1861 (1974). (In the remainder of this Brief, the term "Commission" refers to FERC and the FPC as the context requires.)

[3] While participating as an intervenor in the licensing proceeding, Cooley also initiated a series of state and federal lawsuits against Clifton, seeking damages and injunctive relief against the project. Ultimately, she obtained a ruling from the Fourth Circuit that any rise in the water level attributable to the project was actionable under state law. *Cooley* v. *Clifton Power Co.*, 747 F.2d 258 (4th Cir. 1984). This decision was followed by an award of $89.50 in damages, an injunction regulating the level of the stream at her property, and contempt proceedings to enforce this injunction. See Pet. App. 4a-5a.

sibility that it was not authorized by Section 23(b) to require Clifton to obtain a license.[4]

2. a. On June 6, 1985, the Commission issued an order granting Clifton's application for a license (Pet. App. 65a-80a). Although it no longer claimed that Section 23(b) of the Act required Clifton to obtain a license, the Commission determined that its "authority under Section 4(e) [16 U.S.C. 797(e)] to issue licenses is broader than the prohibition against unlicensed construction or operation contained in Section 23(b)." *Ibid.* Accordingly, it held that Clifton "may seek, but is not required to obtain, a license for its Clifton Mills project" (Pet. App. 68a). The Commission then canvassed a variety of considerations relevant to Clifton's fitness for a license—among them, Cooley's concerns, the safety and adequacy of the project, and environmental considerations. It concluded that issuance of the license was in the public interest and that, upon compliance with its terms, the project would be "best adapted to a comprehensive plan for development of the Pacolet River Basin for beneficial public uses" (Pet. App. 72a). The Commission also acknowledged that the license would give Clifton the power, under Section 21 of the FPA, 16 U.S.C. 814, to acquire through eminent domain that portion of Cooley's land necessary for the operation of the project. Pet. App. 72a.[5]

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[4] *Clifton Power Corp.*, 31 F.E.R.C. ¶ 61,279 (1985).

[5] The Commission upheld this ruling on rehearing (Pet. App. 60a-62a). Although the possibility of Clifton's exercising the power of eminent domain appears to lie at the heart of petitioner's pursuit of this litigation, this question was not presented to the court of appeals and is not before this Court.

b. Cooley requested rehearing. In denying that request, the Commission elaborated on the reasons for its determination that it had authority to issue a license under Section 4(e), even though one was not required under Section 23(b). Pet. App. 20a-64a. The Commission found that the plain wording of Section 4(e) authorized the licensing of all projects within its scope (Pet. App. 22a-25a), concluded that the legislative history "is consistent with and even supports the plain wording of Section 4(e)" (Pet. App. 31a), and found no consistent or established prior agency interpretation that contradicted its understanding of the statute (Pet. App. 37a-40a). The Commission also rejected petitioner's contention that permitting licensing under Section 4(e), where it was not required under Section 23(b), would encourage attempts by third-parties to obtain licenses for projects owned by others, with a view to acquiring those projects through eminent domain. The Commission found that such projects are already susceptible to applications for licenses which propose new construction or generating capacity, and that in any event the Commission would not grant third-party applications where they were not in the public interest or without the project owner's having had an opportunity to protect its interest. Pet. App. 40a-41a.

3. The court of appeals affirmed (Pet. App. 1a-19a). At the outset, it ruled that the "plain language" of Sections 4(e) and 23(b) "[did] not support Cooley's interpretation" (Pet. App. 8a). The court contrasted the language of the second sentence of Section 23(b), which applies only to persons "intending to construct" projects and has thus been held consistently to apply only to projects built after the

Act's passage in 1935, with Section 4(e), which contains no similar language. It concluded that the statute's "plain language gives no indication that Congress intended to limit the Commission's power to grant licenses, as opposed to its § 23(b) authority to require them, to post-1935 projects." Pet. App. 8a.

The court of appeals also agreed with the Commission that the legislative history "buttresses the plain language of the statute" (Pet. App. 8a). The court noted that, under Section 23(b)'s pre-1935 precursor (see Pet. App. 8a n.10), an applicant could not be required to obtain a license for a project on a nonnavigable stream unless it voluntarily filed a declaration of intention, thereby submitting itself to the Commission's jurisdiction; Section 4(e)'s predecessor in turn authorized the issuance of licenses to these "voluntary licensees." But because this "purely voluntary scheme had proved inadequate for the development of a comprehensive system of water power regulation" (Pet. App. 9a), Section 23(b) was added in 1935 to require licenses for all subsequent projects that were subject to Congress' power under the commerce clause. Finding no indication that Congress had thereby intended to remove the Commission's existing authority to issue licenses to "voluntary licensees" for pre-1935 projects, the court reasoned that "it is unreasonable to assume that Congress clandestinely prohibited licensing of an entire category of unlicensed projects, contrary to its clear goal of expanding federal regulation." Pet. App. 9a (footnote omitted). It found, further, that petitioner's interpretation of the statute would "undermine substantially Congress' avowed desire for comprehensive federal regulation of hydropower

projects" by forbidding all licensing of pre-1935 projects on nonnavigable waters (Pet. App. 10a).[6]

The court next rejected petitioner's claim that the Commission's orders in this matter departed from the agency's prior interpretation of Section 4(e). The court agreed with the Commission that although the precise issue had not been decided in prior orders, "the mere absence of such precedent is not the same as a prior inconsistent interpretation" (Pet. App. 12a). Citing *United States* v. *Morton Salt Co.*, 338 U.S. 632, 647-648 (1950), it ruled that the Commission could now exercise authority that Section 4(e) confers even if it had not previously done so (Pet. App. 13a).

Finally, the court of appeals rejected petitioner's argument that the Commission's reading of Section 4(e) "puts pre-1935 project owners at risk because volunteer applicants need not be project owners" (Pet. App. 13a). The court noted that a similar "theoretical threat" to owners of pre-1935 projects was present even under petitioner's interpretation, but that there had been "no cited evidence of massive abuses" (Pet. App. 13a). The court also observed that an owner faced with an application by a non-owner could oppose it or file a competing application, and that any non-owner application would have to meet the Commission's public interest standard (*ibid.*). The court of appeals concluded that "nothing in the statute's language, history, structure or purpose gives any indication that Congress intended to limit the FERC's existing jurisdiction to grant

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[6] The court of appeals also marshalled support for its conclusion in committee hearings and amendments to related sections of the Act (Pet. App. 10a-12a).

licenses voluntarily when it amended the Act in 1935" (Pet. App. 14a).

ARGUMENT

The court of appeals, citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), held that the Commission's reading of its Section 4(e) authority "is a reasonable one, not contrary to any discernible congressional intent" (Pet. App. 14a). This holding is not in conflict with any decision of this Court or of any other court of appeals and does not otherwise warrant further review.

1. Contrary to petitioner's suggestion (*e.g.*, Pet. 4), there is no conflict in letter or spirit between the court of appeals' decision and *Farmington River Power Co.* v. *FPC*, 455 F.2d 86 (2d Cir. 1972), or *Puget Sound Power & Light Co.* v. *FPC*, 557 F.2d 1311 (9th Cir. 1977). Those cases do not hold that the Commission "lacks jurisdiction" over projects constructed prior to 1935 on nonnavigable waterways. Rather, as the court of appeals put it, *Farmington* and *Puget Sound* hold only that "the Commission may not *require* licenses for projects built entirely before 1935," not that "the Commisison may not *grant* licenses voluntarily sought for projects of such advanced age" (emphasis in original). Pet. App. 7a. The question whether Section 4(e) confers power to grant licenses where not required by Section 23(b) was neither presented nor discussed in *Farmington* or *Puget Sound.*

2. Petitioner also contends that "no evidence appears on the face of the statute that Congress intended such an optional scheme of licensing jurisdiction for this class of projects." Pet. 9. However, the

language of the statute is all-encompassing. It authorizes the Commission to issue "licenses * * * for the purpose of constructing, operating, and maintaining dams * * * or other project works * * * across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States." See page 2, *supra*. There is nothing in this section which limits the Commission's authority to projects constructed after 1935, as there is in Section 23(b). It would be particularly anomalous, as the court of appeals found, to construe this inclusive language to withdraw pre-existing authority to license plants built before 1935. As the court of appeals stated, petitioner's interpretation (Pet. App. 10a):

> would undermine substantially Congress' avowed desire for comprehensive federal regulation of hydropower projects by forbidding the licensing of all projects constructed prior to 1935 no matter how great their effects on interstate commerce or the desires of their owners or operators to come within the federal regulatory laws.

Cf. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 180 (1946) (Act's purpose is to establish "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation").

3. Nor does the holding of the court of appeals, as petitioner maintains (Pet. 5), have the "anomalous effect" of "target[ing]" pre-1935 projects for license applications by "strangers." The fact that such applications can be filed does not mean that they will invariably be granted: where no valid

public purpose is served, an application will be denied. Further, an owner faced with a license application for its project can protect itself by opposing the application or filing a competing application. Pet. App. 13a. As the court of appeals observed, there is no evidence that the "theoretical threat" that non-owners may file applications for licenses to improve projects owned by others, which exists even under petitioner's view of the Act, has led to "massive abuses" (Pet. App. 13a). In any event, in this case, any threat from non-owner applicants is purely hypothetical. Petitioner is not a project owner trying to defeat a non-owner's application for a license to use her property. Even if that situation were deserving of this Court's attention, this case does not present it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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